IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 451 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 No

PARAGJI K NAIK THROUGH HIS PAH T H DESAI

Versus

KHANDUBHAI D NAYAK,DECEASED THROUGH HIS HEEIRS & L.RS.

Appearance:

MR SN SHELAT for appellants

MR AKIL KURESHI for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: _13___/09/1999

ORAL JUDGEMENT

C.A.V. JUDGMENT :

1. The appellants-original defendants Nos. 1 and 2 have filed this appeal under Section 96 of the Code of Civil Procedure, challenging judgment and decree dated March 13, 1981, passed by the learned Civil Judge (S.D) Navsari, in Special Civil Suit No.13 of 1978, by which the suit of the plaintiff for specific performance of agreement to sell dated August 15, 1977, came to be decreed and the respondent was directed to deposit the balance of sale price and the appellant No.1 was directed to execute the final conveyance in favour of the

respondent with regard to the suit property. It was further decreed that in the event of final conveyance executed, both the appellants were directed to hand over the possession of the suit property to the respondent.

2. Few facts leading to filing of this appeal are summarised as under:- The respondent and appellant No.1 are descendants of one common ancestor, Ambelal. Said Ambalal had three sons, namely, (1) Ranchhodbhai Ambelal (2) Bhimbhai Ambelal (father of the respondent) and (3) Tikabhai Ambelal (father of appellant No.1). The ancestors of the respondents and appellant No.1 constituted undivided Hindu Joint Family. On Bhadra Sud Agiaras in the S.Y. 1999, there was mutual partition between the members of said two families and necessary 'Lambhas' (family arrangement) were written indicating partition of the properties belonging to the joint family. According to the plaintiff, immovable properties were partitioned and two houses which came to the shares of respondent and appellant No.1 were adjoining to each other. The front and rear chowks as well as open land of wada of the said two houses were of joint ownership. The house of appellant No.1, as described in the plaint, is situated towards east of the house of the respondent. As per the say of the respondent, appellant No.1 resides in a foreign country for gain. The wife of appellant No.1, Bai Promodiben, is the general power of attorney holder of appellant No.1, and by virtue of the said power of attorney, she was managing and dealing with the estate of appellant No.1. On August 15, 1977, the power of attorney holder of appellant No.1, by an agreement to sell, agreed to sell the suit property to the respondent for a sum of Rs.13,251/- and, on the same day of the execution of the agreement, a sum of Rs.251/- was received by the power of attorney holder as earnest money. As per the case of the respondent, he was ready and willing to perform his part of the contract and, therefore, by a notice dated December 17, 1977, he called upon the power of attorney to execute the sale deed of the suit property on or before December 31, 1977. The power of attorney by her reply dated December 22, 1977 shown her willingness to execute sale deed and requested the respondent to prepare a draft sale deed. As per the say of the respondent, even though he was not bound to prepare such a draft sale deed, he was making necessary preparation for the same. In the meanwhile, appellant No.1 sent a notice on January 5, 1978 calling upon the respondent to submit draft sale deed within five days of receipt of the said notice and in the event of his failure, the agreement to sell in question shall stand cancelled. It is alleged by the respondent that

appellant No.1 was instigated by appellant No.2 with whom the respondent was not in good terms. As the respondent suspected bona fides of appellant No.1, he got published a notice on January 3, 1978 in a local newspaper, 'Gujarati Mitra'. After collecting necessary information with regard to the suit property and its survey numbers, the respondent, by letter dated February 15, 1978, sent draft sale deed to appellant No.1 and requested her to execute final sale deed. It is alleged that, instead of executing sale deed, appellant No.1, by her reply, informed the respondent that she had already entered into agreement to sell the suit property with appellant No.2 for a consideration of Rs.11001/- and appellant No.2 was put in possession of the suit property. It is alleged that the appellants in collusion with each other had refused to execute final sale deed and, therefore, the respondent was compelled to file a suit for the relief of specific performance and possession of the suit property.

3. Appellant No.1 filed written statement Exh.26, inter alia, denying all the allegations and averments made in the plaint. Appellant No.1 averred that writing dated August 15, 1977 (i.e. agreement to sell) cannot be called agreement to sell as it was not executed on proper stamp paper and, hence, not admissible in evidence. It was further averred that the writing dated August 15, 1977, is signed by one Parvatiben Tikabhai to whom earnest money was paid by the respondent and, further, the said writing was signed by one Amrutlal Bhimbhai Naik and, therefore, they were necessary and proper parties to the suit and the suit is bad for non-jointer of necessary parties and liable to be dismissed. It was further contended that, as appellant No.1 was in urgent need of money, it was decided to sell the suit property to the respondent. It is the case of appellant No.1 that she had by her notice dated January 5, 1978, called upon the respondent to execute final sale deed within 15 days after making balance payment. However, as the respondent had failed to comply with the time-limit mentioned in the notice, the alleged agreement of sale stood cancelled. It was further contended that, as appellant No.1 was in urgent need of money, by agreement to sell dated January 29, 1978, the suit property was sold to appellant No.2 for a sum of Rs.11,0001/- and appellant No.2 was put in possession of the suit property on the same day. It is averred that appellant No.2 had paid sum of Rs.10,001 to appellant No.1 and had agreed to pay balance amount of Rs.1000 within six months as per the agreement dated January 29, 1978. Appellant No.1 had further contended that, as civil proceedings were pending between the respondent on the one hand and the mother of appellant

No.2 on the other hand, the respondent, with a view to harass both the defendants, had filed false suit with ulterior motive. It was further contended that, on account of breach of the contract by the respondent. appellant No.1 had suffered loss of Rs.2250/- and therefore she, by her notice dated February 21, 1978, called upon the respondent to make good the said loss/damage caused to her. It was further contended that the suit filed by the respondent was barred by law of limitation, delay and laches and, therefore, the same be dismissed with costs.

4. Appellant No.2, by filing written statement Exh.28, contended that appellant No.1 by agreement to sell dated January 29, 1978, agreed to sell the suit property to him and he was put in possession on the same day as he had paid part of consideration of Rs.10,001/to appellant No.1. It was contended that the respondent had no right to bring the present cause of action against him as the agreement of sale dated August 15, 1977 was legally terminated and was not in force when he entered into agreement of sale on January 29, 1978. It was also contended by appellant No.2 that the agreement of sale dated August 15, 1977 was not admissible in evidence and the suit was bad for non-jointer of necessary parties and, therefore, the suit deserves to be dismissed with costs.

5. On the aforesaid pleadings of the parties, learned Trial Judge framed issues at Exh.39. The parties to the suit led documentary evidence. The respondent, in support of his case, examined himself at Exh.70 and produced documentary evidence. On behalf of appellant No.1, his wife, who is power of attorney holder, was examined at Exh.76. Appellant No.2 himself was examined at Exh.82.

6. Learned Trial Judge, on appreciation of oral as well as documentary evidence, arrived at the following conclusions:-

(1) The respondent had proved partition of ancestral properties between the ancestors of the respondent and appellant No.1.

(2) It is proved that on August 15, 1977, power of attorney holder of appellant No.1 had executed agreement to sell of the suit property in favour of the respondent.

(3) Appellant No.1 had failed to prove that the agreement to sell dated August 15, 1977 is not admissible in evidence.

(4) Parvatiben Tikabhai and Amrutlal Bhimbhai Naik were not necessary parties to the suit and, therefore,

the suit was not bad for non-jointer of necessary parties.
(5) Time was not essence of agreement to sell and appellant No.1 had committed breach of agreement to sell.
(6) The respondent was always ready and willing to perform his part of contract.
(7) The respondent had not committed breach of contract as alleged by appellant No.1.
8) The suit filed by the respondent was not barred by period of limitation.
On the basis of abovereferred to conclusions, learned Trial Judge, by his judgment and decree dated March 13, 1981, allowed the suit filed by the respondent by passing a decree that the respondent shall deposit in the court balance amount of sale price on or before April 30, 1981 and, on deposit of balance amount of sale price being made, appellant No.1 shall execute final conveyance in favour of the respondent with regard to the suit property and to get the same registered as required under law. It was further directed that the respondent shall bear the cost of stamp duty of conveyance as well as the cost of registration and on final conveyance executed and duly registered, both the appellants jointly and severally shall put the respondent in possession of the suit property in question. The appellants have challenged the said decree passed by learned Trial Judge by filing this appeal.

7. Learned counsel for the appellants as well as learned counsel for the respondent have taken me through the entire evidence produced in the proceedings before the Trial Court. Learned counsel for the appellant contended that, even though in agreement to sell dated August 15, 1977, time was not made essence of the contract, yet, appellant No.1, by serving notice dated December 17, 1977 (Exh.58), had made time as essence of contract, and, since, the respondent failed to get the sale deed executed within 15 days as mentioned in the notice, the agreement of sale stood terminated and, therefore, appellant No.1 was within her right to enter into agreement to sell with appellant No.2 on January 29, 1978. It was further contended by learned counsel for the appellant No.1 that the respondent was never ready and willing to perform his part of the contract since he had not made any enquiry with respect to particulars of the title of the suit property, which he needed to purchase pursuant to the agreement to sell dated August 15, 1977. Learned counsel for the appellants further submitted that the respondent was never ready and willing to perform his part of contract and, therefore, the agreement to sell executed between appellant No.1 and

appellant No.2 is valid and legal and, therefore, the appeal be allowed and the judgment and decree of the Trial Court be set aside.

8. Learned counsel for the respondent submitted that in agreement of sale in respect of immovable property, time was not essence of contract and appellant No.1 had no right by serving a notice Exh.58 to make time as essence of contract by incorporating time limit to execute sale deed and thereafter terminating agreement of sale dated August 15, 1977. It is contended by learned counsel for the respondents that agreement of sale dated August 15, 1977, could not have been terminated by appellant No.1 unilaterally and, thereby, entering into illegal sale with appellant No.2 by so-called agreement dated January 29, 1978 and putting appellant No.2 in possession of the suit property. It is contended that when time was not essence of the contract in agreement of sale dated August 15, 1977, by notice Exh.58, time cannot be made essence of the contract. It is further contended by learned counsel for the respondent that, if such a condition is permited tobe incorporated by appellant No.1 in the agreement by making time as essence of contract, then it would amount to allowing the parties to enter into fresh agreement which cannot be legally permitted. At the end, learned counsel for the respondent submitted that the Trial Court had rightly come to the conclusion that the plaintiff was ready and willing to perform his part of contract and appellant No.1 had no right to terminate agreement of sale dated August 15, 1977 and further that the agreement of sale executed between appellant No.1 and appellant No.2 on January 29, 1977, was illegal. Learned counsel for the respondent contended that the Trial Court had rightly exercised its discretion by decreeing the suit of the respondent for specific performance, and, therefore, this court may not interfere with the exercise of discretion and the appeal be dismissed with costs.

9. It is an admitted fact that agreement to sell dated August 15, 1977 of the suit property for a consideration of Rs.13,251/- does not make time as essence of the contract. The agreement to sell mentions that, whenever a final deed is to be executed, balance of amount of consideration shall be paid and Rs.251/- were received as earnest money. It is also mentioned in the agreement to sell that part of the suit property was still undivided and is a joint family property. Applicant No.1 was serving for gain outside the country and he had executed general power of attorney in favour of his wife. The wife of appellant No.1, namely,

Pramodiben, was examined at Exh.76. In paragraph 7 of her deposition, she deposed that her husband had constructed a new house and, therefore, they were not in need of suit property. It is further deposed that, as they were not in need of the suit property and as it was lying vacant, they had decided to sell it to the respondent. Exh.71, which is agreement to sell in respect of the suit property executed between appellant No.1 and the respondent, and the oral testimony of the respondent and appellant No.1 indicate that time was not essence of the contract. The respondent in his oral testimony has stated that he suspected that appellant No.1 in collusion with appellant No.2 might not execute sale deed in his favour and, therefore, he had served a notice dated December 17, 1977 (Exh.68) to appellant no.1 to execute sale deed on or before December 31, 1977. In response to the said notice, appellant No.1 had sent her reply on December 22, 1977 (Exh.57) which was received by the advocate of the respondent on December 29, 1977. The evidence of the respondent shows that he came to know about the reply of appellant No.1 on January 5, 1978. Prior to January 5, 1978, as the respondent smelt mala fide intention of the appellants, he got published a notice in daily newspaper, Gujarat Mitra, on January 3, 1978 (Exh.64), informing the public at large that he had entered into agreement to purchase the suit property. After the public notice was given in the newspapers, appellant No.1 sent a notice on January 5, 1978 (Exh.58) which was received by the advocate of the respondent on January 6, 1978. In the said notice, appellant No.1 had called upon the respondent to submit draft conveyance deed within 5 days and to execute final conveyance deed within 15 days on paying balance amount of consideration of the suit property. Thus, for the first time, appellant No.1 introduced a new condition which was not incorporated in agreement to sell (Exh.71) that the respondent should submit a draft conveyance deed. It is borne out from the evidence of the respondent that, as part of the suit property was undivided, he was trying to find out survey numbers and details of the said part of undivided property and, therefore, he could not prepare draft sale deed as stipulated in the notice dated January 5, 1978 sent by appellant No.1. After frantic search by appellant No.1, he could procure information from the revenue authorities about the nature and survey number of the suit property which had remained undivided and, therefore, on February 15, 1978 (Exh.60) he sent a notice to appellant No.1 with draft conveyance deed requesting her to execute sale deed of the suit property.

10. On receipt of the notice of the respondent, appellant No.1 by notice dated February 21, 1978 (Exh.62) informed the respondent that she had already terminated the suit contract and agreed to sell the suit property in question to appellant No.2 for consideration of Rs.11,001/-. The evidence shows that, meantime, appellant No.1, by agreement to sell dated January 29, 1978, had sold away the suit property to appellant No.2. In the trial court, appellant No.1 introduced a case for the first time that as she was in dire need of money she had sold the suit property to appellant No.2. Nowhere in the documentary evidence, appellant No.1 had stated that, as she was in need of money, she had sold the suit property to appellant No.2. Agreement to sell (Exh.71) does not indicate that time was essence of the contract. The conduct of the respondent shows that he was ready and willing to perform his part of the contract. Appellant No.1, for the first time, introduced a condition that the respondent should furnish copy of draft sale deed within five days and to execute final sale deed within 15 days thereafter. This condition was never incorporated in the agreement to sell (Exh.71). A party cannot unilaterally introduce a new clause with a view to deprive another party of his right to get a sale deed executed with regard to a property. The conduct of the respondent shows that right from December 1977, he had shown his willingness to perform his part of contract and to get the sale deed executed in his favour. On the contrary, conduct of appellant No.1 was to deprive the respondent of his right to purchase the suit property by colluding with appellant No.2. Appellant No.1, by notice Exh.62, dated February 21, 1978 (Exh.62) had terminated agreement to sell (Exh.71) in spite of the fact that the respondent had already sent copy of draft deed to appellant No.1 by his notice dated February 15, 1978 (Exh.60). The conduct of appellant No.1 clearly indicates that with a view to deprive the respondent of his legal right to get sale deed executed, she had unilaterally by notice Exh.61 terminated agreement to sell (Exh.71). It is pertinent to note that before terminating agreement to sell (Exh.71), appellant No.1 had already executed another agreement to sell on January 29, 1978 with appellant No.2. Before terminating agreement to sell (Exh.71), appellant No.1 had not returned amount of earnest money of Rs.251/- to the respondent and, therefore, it can be concluded that appellant No.1 had no right to terminate agreement to sell (Exh.71) without complying with the provisions of law. In my view, appellant No.1 had no right to terminate agreement to sell (Exh.71) which remained in force when the suit property was agreed to be sold to appellant No.2 on January 29, 1978. When time

was not essence of the contract, appellant No.1 cannot introduce a new clause in the agreement to sell and make time as essence of the contract. By introducing new clause to make time as essence of contract in the agreement to sell, appellant No.1 had tried to create a new document which is not permissible under law and, therefore, notice to terminate agreement to sell (Exh.71) is void and appellant No.1 had no right to execute another agreement to sell on January 29, 1978 in favour of appellant No.2.

11. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, conduct has to be properly scrutinized. The evidence of the respondent proves that he had sufficient fund to pay balance amount of consideration. Over and above his financial condition, the respondent had shown his willingness to perform his part of the contract. Even though there was no condition in agreement to sell (Exh.71) to submit draft sale deed, he had, with great difficulty after obtaining information from the revenue authorities, prepared draft sale deed and sent it to appellant No.1. The conduct of the respondent shows that he was ready and willing to perform his part of the contract. To grant a relief of specific performance of an agreement is a discretionary relief and the Court should see the conduct of the parties and attending circumstances to grant relief of specific performance. Section 20 of the Specific Relief Act, 1963, provides that jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief. Sub-section (2)(b) of Section 20 of the said Act reads as under:

"20. Discretion as to decreing specific performance:-

(1) xx xx xx xx

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance.

(a) xx xx xx xx

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) xx xx xx xx

Explanation: xx xx xx xx"

As per the provision of sub-section (2)(b) of Section 20 of the Specific Relief Act, 1963, where the performance of the contract would involve some hardship on the defendant which he did not foresee whereas its

non-performance would involve no such hardship on the plaintiff, the relief of specific performance can be refused. The question of hardship must be judged as on the date of the transaction and not in the light of subsequent events and the hardship shall be one collateral to the contract. The question of hardship of a contract is to be judged as to the time at which it is entered into. In the present case, appellant No.1 had entered into agreement to sell in respect of the suit property with the respondent, as the suit property was lying vacant and the appellant No.1 had constructed a new bungalow. The suit property being surplus and some part of it was in joint possesion, appellant no.1 had knowingly fully well entered into agreement to sell with the respondent. Taking over all view of the evidence on record, I am of the view that no hardship would be caused to appellant No.1 if relief of specific performance of the agreement to sell is granted. On the contrary, if the relief of specific performance of the agreement to sell is not granted, hardship would be caused to the respondent. In my view, judging from all angles, and in view of the evidence produced on the record of the case, the conduct of the respondent shows that he was entitled to discretionary relief of specific performance of agreement to sell dated August 15, 1977. Appellant No.1, without there being any justiciable reason, had terminated agreement to sell (Exh.71) and had, before terminating the suit agreement, sold away the suit property to appellant no.2 by agreement to sell dated January 29, 1978. It is noted that, before terminating the suit agreement, appellant No.1 had not returned earnest money to the respondent. Thus, the conduct of appellant No.1 shows that she was acting mala fide and in collusion with appellant No.2, who was on inimical terms with the respondent.

12. As a result of foregoing discussion, the finding of the Trial Court that the plaintiff-respondent was ready and willing to perform his part of the contract and has never abandoned the said right and the finding of the trial court that time was not essence of the agreement to sell and appellant No.1 had committed breach of the contract, do not call for any interference. On the contrary, the finding of the trial court that it was defendant-appellant No.1 who had committed breach of the contract by illegally terminating the agreement to sell and by getting another sale agreement executed with appellant No.2, and handing over possession of the suit property to him, deserves to be confirmed.

13. As a result of foregoing reasons, I do not find

any merit in the appeal and is hereby dismissed with costs. In the operative portion of the impugned judgment and decree, the Trial Court had directed the respondent to deposit in the Court balance of sale price on or before April 30, 1981. Because of pendency of the appeal and injunction/stay granted in favour of the appellants, sale deed could not be executed and, therefore, now when the appeal is dismissed, the respondent is directed to deposit balance of sale price on or before October 30, 1999 in the Court. On respondent depositing balance amount of sale price in the Court, appellant No.1 should execute final conveyance deed in favour of the respondent with regard to the suit property and get the same registered as required under law on or before 30.11.1999. Directions contained in the operative portion of the order of the Trial Court in paragraphs 3,4, 5,6 and 7 are not disturbed.

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(swamy)